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FILED
MAR 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1373

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JESSIE SHORT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents argue (Br. in Opp. 4-10, 14-20) that the original Hoopa Valley Reservation, as extended by Executive Order in 1891 to include the historically separate Klamath River Reservation 25 miles downstream and the intervening Connecting Strip, "was intended to be one integrated Reservation" (*id.* at 9). But they never make clear *who* they believe "intended" this result.

a. At several places respondents appear to suggest that it was Congress that so intended, when it passed the Act of Apr. 8, 1864,[1] pursuant to which the 1891 Executive Order was issued—*i.e.*, that the 1864 Act itself rigidly required that the substantive rights of all Indians or tribes of Indians located within the boundaries of any one of the four reservations authorized by the 1864 Act must be integrated into one common pool, irrespective of whatever separate rights

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[1]Ch. 48, 13 Stat. 39.

each previously may have had. See Br. in Opp. 5, 7, 9, 17. This is obviously incorrect. Section 2 of the Act (13 Stat. 40) explicitly grants the President "discretion" in setting apart four reservations "of suitable extent," and to do so with "due regard to their adaptation to the purposes for which they are intended." This Court has stressed in the specific context of the extension of the Hoopa Valley Reservation at issue here that the 1864 Act conferred on the President a "large discretion," inter alia, "to alter and enlarge the reservations from time to time in the light of experience." *Donnelly* v. *United States*, 228 U.S. 243, 256-257 (1913). The language of the Act itself and of this Court's decision in *Donnelly* scarcely suggests that Congress restricted the ability of the President to establish or alter reservations in a manner that preserves, to the extent possible, the separate identities and interests of the different Indians and tribes of Indians who live there.[2]

Of particular significance, however, is the final proviso to Section 2 of the 1864 Act, which provides that the four reservations authorized by that section may, "as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state." This proviso manifests a congressional intent to *preserve* the separate interests of Indians occupying pre-existing reservations that were included in the reservations authorized by the 1864 Act. Recognition of the separate identities of the

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[2]Under respondents' view that the 1864 Act required the President to establish an "integrated" reservation, the Indians residing on any one of the numerous non-contiguous tracts set aside for different bands of Mission Indians in California, which constitute one reservation for purposes of the 1864 Act (*Donnelly* v. *United States, supra*, 228 U.S. at 258; *Mattz* v. *Arnett*, 412 U.S. 481, 493-494 n.15 (1973)), would have an interest in *all* of the tracts set aside for other bands. This would be a startling result.

Klamath River and original Hoopa Valley Reservations after the two were joined by the Connecting Strip in the 1891 Executive Order therefore is fully consistent with this proviso. Such recognition of the separate identities of different tracts in a divided reservation is consistent as well with the fact that the 1864 Act was principally an administrative and cost-saving measure designed to bring all Indians in California under one superintendent and four Indian agents.[3]

If there were any doubt about Congress' intent, moreover, it is dispelled by laws passed by Congress subsequent to the 1891 Executive Order joining the Klamath River and Hoopa Valley Reservations that have continued to recognize the separate identity of the Klamath River Reservation. The Act of June 17, 1892,[4] for example, provided for the allotment of lands within the Klamath River portion of the expanded Hoopa Valley Reservation only to Indians residing there, with the proceeds of the sale of unallotted lands likewise to be expended for the benefit of the Indians then residing on the Klamath River Reservation. The passage of this Act is flatly inconsistent with respondents' contention that the 1891 Executive Order necessarily merged the interests of all Indians of the expanded Reservation into a common pool, for, under respondents' view, the proceeds of the sale of the unallotted lands should have been expended for the benefit of Indians on the original Hoopa Valley Reservation and the Connecting Strip as

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[3]For this reason respondents plainly err in contending that a joining of the two Reservations solely for administrative purposes would be a "circumvention" of the 1864 Act. In any event, as we have explained (81-1373 Pet. 8), the extension of the Reservation in 1891 was intended to protect the lands of respondents' forbears on the Klamath River Reservation and the Connecting Strip, in view of the uncertain status of that land.

[4]Ch. 120, 27 Stat. 52.

well. In light of the 1892 Act, therefore, it was entirely reasonable for the Secretary to conclude that, in like fashion, the revenues derived from the unallotted lands on the original Hoopa Valley Reservation should be expended for the benefit of Indians of that portion of the expanded Reservation. Similar congressional enactments in 1917, 1942, and 1958 recognizing the continued separate identity of the old Klamath River Reservation further support the Secretary's determination. See 81-1373 Pet. 20-21.

b. Perhaps respondents mean to argue instead that the President intended in the 1891 Executive Order to merge the historically separate interests of the Indians of the Klamath River and the Hoopa Valley Reservations (and the intervening Connecting Strip) into a common pool. But respondents, in their discussion of the Executive Order (Br. in Opp. 7-9, 16, 22), point to no evidence of such a Presidential intent, and we are aware of none. To the contrary, this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481, 502 (1973), established that the specific purpose of the 1891 Executive Order was to preserve the lands of the Klamath River Reservation for the benefit of the Indians occupying those lands.[5] It would be inconsistent with that purpose to have conferred on Indians of the original Hoopa Valley Reservation and the Connecting Strip an interest in the lands of the Klamath River Reservation as well; yet this would be the necessary consequence of respondents' theory that the 1891 Executive Order created a wholly "integrated" reservation. As explained above, moreover, Congress recognized the continued separate identity of the old Klamath River Reservation less than a year after the 1891 Executive

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[5]Respondents' suggestion (Br. in Opp. 7-8) that the original Hoopa Valley Reservation was extended in 1891 to take in the Connecting Strip and Klamath River Reservation because the original reservation was unsuitable for Indian homesites therefore is wholly without merit, and respondents cite to nothing to support it.

Order was promulgated, when it passed the special allotment act for those lands in 1892.

The Executive's understanding that the interests of all Indians were not merged into a common pool is further demonstrated by the subsequent allotment of the Connecting Strip and the original Hoopa Valley Reservation, under the General Allotment Act, only to Indians of those respective portions of the expanded reservation. See 81-1373 Pet. 9-10. This pattern was continued by the Secretary's conducting of separate elections on the original Hoopa Valley Reservation and the Extension to determine whether the Indians concerned wished to organize under the Indian Reorganization Act, ch. 576, 48 Stat. 984. Against this background, it was entirely reasonable for the Secretary to pay revenues derived from the timber on the original Hoopa Valley Reservation (the Square) to the Indians who have a nexus to it, particularly in view of the fact that the Indians of the Extension had already received valuable timber allotments in their area which were not shared by the Indians of the Square.

2. Putting the merits of the "integrated reservation" issue to one side, respondents' brief in opposition serves only to underscore the need for review by the Court.

a. Most importantly, respondents make clear that, in their view, individual Indians having a nexus to any of the three district segments of the expanded Reservation have a *personal* entitlement to the reservation's benefits (Br. in Opp. 26). While conceding (*id.* at 25) that these benefits have been recognized in other circumstances as "communal" in nature—*i.e.*, belonging to the tribe, not individual Indians, see *United States* v. *Jim*, 409 U.S. 80, 82 (1972)—respondents contend that because they have no governing body and, hence, no "communal entity" to which a money judgment may be awarded, they have an individual right to recover in this suit.

As we pointed out in our petition (at 13-15), however, the Secretary sought to protect the integrity of the tribal ownership of reservation property by moving to substitute the Yurok Tribe for the individual respondents below[6] and sought to organize a tribal government for the Yurok Tribe. Respondents resisted these efforts, preferring to retain what they preceive to be their individualized interests in reservation matters under the decisions below, and the Secretary's initiative failed. Respondents therefore cannot fairly rely upon the absence of a Yurok tribal government in asserting an individual right of recovery here.

b. In a similar vein, respondents maintain (Br. in Opp. 22-23) that the Court of Claims' decision should be read to bar the Secretary of the Interior even from recognizing the original Hoopa Valley Reservation as a *governmental* unit separate from the Extension, to be governed (as in the past) by the Hoopa Valley Tribe, and to require instead that the Secretary "assist" in the formation of a reservation-wide governing body. This would constitute a direct interference with the Secretary's authority over Indian affairs and with the responsibility of the political Branches to recognize Indian tribes. See Pet. 23-26. Indeed, some of the respondents herein are parties to a suit challenging the governmental authority of the Hoopa Valley Tribe on the ground that

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[6]Respondents contend (Br. in Opp. 3) that the Yurok Tribe is a "non-existent entity." However, Congress concluded otherwise in 1958—just five years before this suit was filed—when it restored certain unallotted acreage on the Klamath River Reservation to "tribal ownership." Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121; see also Act of Feb. 14, 1920, ch. 75, 41 Stat. 408, 418 (authorizing expenditure "from the tribal fund known as 'proceeds of Klamath River Reservation, California' * * *"); *Mattz* v. *Arnett, supra*, 412 U.S. at 484-486 (referring to the "Yurok Tribe"); *Thompson* v. *United States*, 44 Ct. Cl. 359, 363-365 (1909). The fact that the Yuroks do not have a recognized tribal *government* does not mean that there is no tribe within the contemplation of Indian law.

the Hoopa Valley Reservation was established for individual Indians, not tribes of Indians. *Puzz* v. *United States Department of the Interior*, No. C 80-2908 TEH (D.C.N.D. Cal., filed, Feb. 26, 1982); Hoopa Reply Br. App. J2. The district court in that proceeding has stayed further proceedings pending this Court's disposition of the instant case.

For these reasons, it seems inevitable that the decisions of the Court of Claims in this case, if allowed to stand, will only exacerbate the seriously divisive conditions extant on the Reservation and will substantially interfere with the efforts of the Secretary and the Hoopa Valley Tribe to administer affairs within their respective jurisdictions. The Ninth Circuit similarly has taken notice of the division between the Hoopas and the Yuroks on the Reservation. *Blake* v. *Arnett*, 663 F. 2d 906, 913 (9th Cir. 1981). Review by this Court of the decision below—which has provoked these conditions—therefore is warranted in the interest of the orderly administration and peaceful enjoyment of the Reservation.

c. Finally, the Hoopa Valley Tribe, like respondents (see page 5, *supra*), construes the Court of Claims decision as recognizing some form of individualized entitlement to receive the benefits of the Reservation (Br. in Opp. 22 n.14, 24-26; 81-1371 Pet. 22-26; 81-1371 Reply Br. 7-8).[7] If read in this fashion, the decision below would be flatly inconsistent

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[7]As explained in our petition (at 27 n.17), the Court of Claims' opinion can be read to require payments to the individual respondents only because the Hoopa Valley Tribe, with the approval of the Secretary, has determined to make per capita payments to the members. Our petition did not make clear that not all of the timber revenues from the Square have been distributed on a per capita basis, however. We have been informed by the Department of Interior that a substantial portion of the revenues instead has been expended by the Hoopa Valley Tribe or by the Secretary for tribal activities and governmental matters affecting the Square. Respondents are seeking an accounting of these funds as well.

with decisions of this Court holding that unallotted reservation assets belong to the tribe, not individual Indians. See, *e.g., United States* v. *Jim, supra*. This could, in turn, create considerable uncertainty and administrative burdens for the Secretary in the administration of those assets, especially in view of the substantial number of other reservations that have been established using language that likewise is capable of a reading that confers rights on individual Indians. See 81-1371 Pet. App. F.

For the foregoing reasons, and the additional reasons stated in the petitions, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1982

DOJ-1982-03